STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2007
v	No. 266892 Macomb Circuit Court
CHARLES ROBERT RUCKER, Defendant-Appellant.	LC No. 05-001858-FH

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant was charged with first-degree home invasion, MCL 750.110a(2), and felonious assault, MCL 750.82. Following a jury trial, he was convicted of the lesser offenses of third-degree home invasion, MCL 750.110a(4), and simple assault,[1] MCL 750.81. Pursuant to MCL 769.11, he was sentenced as a third habitual offender to 34 months to 10 years in prison for the home invasion conviction, and to 93 days for the assault conviction, with credit for 179 days served. Defendant appeals as of right, and we affirm.

I

Defendant's convictions arise from the assault of his sister. Defendant's sister resided in a duplex with her children and with defendant's two young children. Sometime after midnight, while defendant's sister was lying on a couch in the living room, defendant entered through her front door without permission. Defendant held a knife as he approached his sister. He threatened to kill her and his children if his sister did not promptly return the children. Defendant never pointed the knife blade toward his sister. Defendant demanded that the victim "send [the children] back" in the morning.

There was also testimony that defendant had two cellular-phone conversations with his sister's 17-year-old son, William. At 12:16 a.m., defendant asked William about the victim's location. William replied that he was not with his mother at that time. At 1:01 a.m., defendant

[1] The judgment of sentence identifies this conviction as "assault or assault and battery," and the parties at times refer to the conviction in their briefs on appeal as one of "assault and battery." However, the record makes clear that the conviction was for simple assault only.

again called William. Defendant asked to speak with his sister, but William again told defendant that he was not with her. Defendant was cursing and told William that he did not want William's mother to have the children. After William returned home at about 1:10 a.m., he learned from his mother what defendant had done. Defendant's sister reported the matter to the police at about 2:03 a.m. She later went to defendant's residence, at the request of the police, to identify a knife that looked like the one defendant had possessed.

Defendant presented several witnesses, including his fiancée Denise Brooks, to support his theory that the victim was not credible and to suggest that he had gone to his sister's home without a knife, merely to check on his children's welfare. Brooks testified that she and defendant were living together at the time. Brooks was familiar with defendant's two children, both of whom had been placed with defendant's sister after being removed from foster care. Although defendant had experienced problems with his sister in the past, they were getting along at the time the children were removed from foster care. On April 23, 2005, defendant left home at about midnight, after eating dinner with Brooks and making a phone call. He made another phone call after returning home at about 1:01 a.m. Brooks saw defendant take off his coat, but did not see a knife. Police officers arrived a short time later, seized knives from defendant's home, and arrested defendant. Brooks later spoke with defendant's sister, who allegedly told her that she still held a grudge against defendant for a past dispute over their late mother's property.

II

On appeal, defendant argues that the prosecutor engaged in misconduct by eliciting testimony from his sister suggesting that defendant had raped her in the past. We note that defendant has failed to support his argument with specific page references to the transcript, as required by MCR 7.212(C)(7). "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Defendant's argument is apparently based on the following testimony of his sister, explaining why she had difficulty answering counsel's question about any grudges that she may have held against defendant:

> *Q*. Okay. And why did you have difficulty answering that question?
>
> *A*. Because Charles [defendant] have [sic] abused me for years. When I say years, starting back when I was five years old, being raped by him, up until I was like ten years old.

Defendant did not object to the prosecutor's question in this regard or raise any specific claim of prosecutorial misconduct when objecting to his sister's answer. In order to timely object to a prosecutor's question, an objection should be made between the question and the answer. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Further, an objection on one ground is insufficient to preserve an appellate challenge based on a different ground. *People v Bulmer*, 256 Mich App 33, 34-35; 662 NW2d 117 (2003). We review defendant's unpreserved claim of prosecutorial misconduct for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We conclude that defendant has not established prosecutorial misconduct that amounts to plain error in this case. We disagree with defendant's assertion on appeal that the only purpose

of the prosecutor's question was to disparage defendant as a person. The record plainly reveals that before the challenged testimony, defense counsel undertook to cross-examine defendant's sister concerning whether she had a "longstanding grudge" against defendant. Defendant's sister denied having a longstanding grudge, citing the fact that she had allowed defendant's children to stay in her home. She also specifically denied defense counsel's claim that she had a grudge against defendant as a result of an alleged dispute over their late mother's personal property, but indicated that there had been disagreements over the course of their relationship.

On redirect examination, in response to the prosecutor's inquiries concerning why she had hesitated in answering defense counsel's questions, defendant's sister testified that she had a long history of being abused by defendant. When defense counsel objected to defendant's sister's testimony in this regard, the prosecutor indicated that the testimony concerning prior bad acts was unexpected. The trial court overruled the objection, finding that defense counsel had opened the door to the prosecutor's questions and that the testimony of defendant's sister was relevant to her motive for testifying in this case.

Defense counsel then objected to defendant's sister's subsequent testimony that defendant had raped her, arguing that the incident was too old and prejudiced the defense. The trial court instructed the prosecutor that defendant's sister was not to give details about the abusive relationship. On the next day of trial, before any further redirect examination regarding the matter, the trial court determined that the evidence was not relevant because it was not offered for a proper purpose under MRE 404(b). The trial court sua sponte instructed the jury to disregard testimony regarding "other bad acts of the defendant" and that "[y]ou must not convict the defendant here because you think he is guilty of other bad conduct."

"[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor is entitled to attempt to introduce evidence that he or she believes will be accepted by the trial court, so long as the attempt does not prejudice the defendant. *Id.* at 660-661. Here, it is not plain that the prosecutor acted in bad faith by questioning defendant's sister about why she had difficulty answering defense counsel's question. Although the trial court ultimately struck the testimony about her prior abusive relationship with defendant, MRE 404(b) is not implicated simply because the prosecutor's questioning of a witness reveals other alleged bad acts committed by the defendant. See *People v Lukity*, 460 Mich 484, 498-499; 596 NW2d 607 (1999). The question asked of defendant's sister in this case was intended to shed light on her motive for testifying; it was not solely asked in an attempt to prove that defendant had acted in conformity with his alleged prior bad acts. "Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); see also *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

Moreover, the trial court instructed the jury to disregard the testimony of defendant's sister. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The prejudicial effect of the stricken testimony was not so severe that it could not be cured by the trial court's instruction. *Id.* Considered in the context of the whole record, we conclude that

defendant has not met his burden of establishing that the prosecutor's alleged misconduct constituted outcome-determinative plain error. *Carines, supra* at 763-764.

III

Defendant seeks resentencing on the ground that the trial court misscored two offense variables used to determine the legislative sentencing guidelines range for his third-degree home invasion conviction. Defendant argues that, based on the jury verdict, the trial court should not have scored five points for OV 1, MCL 777.31(1)(e) ("weapon was displayed or implied"), or five points for OV 2, MCL 777.32(1)(d) ("offender possessed a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon").

Contrary to defendant's argument, the rule in *Blakely v Washington*, 542 US 296, 124 S Ct 2531; 159 L Ed 2d 403 (2004), holding that a sentencing judge may not increase a defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant, does not apply to Michigan's indeterminate sentencing scheme under which only the minimum sentence is affected. *People v Drohan*, 475 Mich 140, 159-161; 715 NW2d 778 (2006). Further, because a prosecutor must prove contested facts for use in the scoring of offense variables only by a preponderance of the evidence standard, the scoring of offense variables need not be consistent with the verdict. *People v Perez*, 255 Mich App 703, 713; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003).

Here, the trial court found by a preponderance of the evidence presented at trial that defendant possessed a knife at the time of his entry into his sister's home. Given that there was sufficient evidence presented to support the trial court's decision, we affirm the trial court's scoring of OV 1 and OV 2. *Id*. at 712-713.

IV

In a supplemental brief filed in propria persona, defendant argues that he was denied the effective assistance of counsel. Because defendant did not move for a *Ginther*[2] hearing or new trial on this basis, our review is limited to mistakes apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001). We decline to consider the affidavit filed with defendant's supplemental brief. Ex parte affidavits, filed for the first time with an appellate brief, may not serve to enlarge the record on appeal. *People v Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981).

Limiting our review to the record established below, defendant has shown neither the deficient performance nor the prejudice necessary to succeed on a claim of ineffective assistance of counsel. *Rodgers, supra* at 714. Defendant asserts that counsel was ineffective (1) for failing to call witnesses to impeach his sister's testimony, (2) for failing to object to his sister's presence in the courtroom, and (3) for failing to call defendant, himself, as a witness at trial. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* The decision to call or question a witness is presumed to be a matter of trial

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Further, whether and how to impeach a witness are similarly matters of trial strategy left to counsel's professional judgment. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *Rockey, supra* at 76-77. The record does not show that trial counsel's failure to call additional witnesses to impeach the credibility of defendant's sister actually prejudiced defendant in any way. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Nor does the record indicate that trial counsel was ineffective for failing to object to defendant's sister's presence in the courtroom. Although the court's sequestration order provided that defendant's sister could not be present during certain testimony, the trial court promptly asked her to leave the courtroom once it was realized that she was present. Because there was no additional action that defense counsel could have taken in this regard, counsel's performance necessarily did not fall below an objective standard of reasonableness. *Id*.

With regard to defendant's specific claim that defense counsel provided ineffective assistance by deciding that he should not testify, we note that the trial court specifically informed defendant at trial that it was *his own choice* whether to testify. A defendant's right to testify in his own defense is a personal right of the defendant himself—not of his trial counsel. See *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). The record does not reveal why defendant chose not to testify. However, in light of the fact that defendant decided to forgo testifying in this case, we deem defendant to have waived his right to do so. *Id*. The existing record does not support defendant's claim of ineffective assistance of trial counsel in this regard.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra